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Via ECF and E-Mail (Jennelle_Gonzalez@txs.uscourts.gov)

Honorable Charles R. Eskridge III
U.S. District Court for the Southern District of Texas
515 Rusk Street, Room 8607
Houston, TX 77002

Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corporation, et al.,
C.A. No. 4:20-cv-00576; U.S.D.C., Southern District of Texas, Houston Division

Dear Judge Eskridge:

We write on behalf of Defendants pursuant to Rule 15(c) of the Court's Procedures to respond to Lead Plaintiffs' February 22 letter ("Initiating Letter") seeking leave to file a motion to compel production of voluminous materials covered by the attorney work product doctrine ("Withheld Materials"), which relate to an investigation by the Anadarko Audit Committee ("AAC"). Because there is no basis to claim any waiver of the protection of such materials, Lead Plaintiffs' request to file a motion to compel should be denied.[1]

In April 2016, the AAC retained Norton Rose Fulbright LLP ("NRF") to perform an internal investigation into allegations by Lea Frye, a Senior Reservoir Engineer at Anadarko Petroleum Corporation ("Anadarko"). In May 2016, Ms. Frye submitted a letter containing those same allegations to the Securities and Exchange Commission ("SEC"). In connection with Ms. Frye's letter to the SEC, NRF provided several productions of documents to the SEC and, in November 2016, made a presentation to the SEC. All materials provided to the SEC—including the document productions and the presentation provided to the SEC—have been produced to Lead Plaintiffs in this litigation. On January 10, 2017, the SEC sent to NRF a "Termination Letter" indicating that the SEC was not recommending an enforcement action, which was produced to Lead Plaintiffs months ago.

Despite Lead Plaintiffs' possession of the very same materials the SEC possessed when it issued its Termination Letter, Plaintiffs now seek to compel all work product related to the investigation claiming that Defendants (i) shared certain Withheld Materials with KPMG and/or J.P. Morgan while the investigation was ongoing; and (ii) showed the Termination Letter to putative class representatives during depositions. Both arguments fail.

First, Defendants did not waive work product protection by sharing certain materials with KPMG—Anadarko's independent auditor—or J.P. Morgan—Anadarko's lead underwriter of a September 2016 equity offering. Materials shared with non-adversarial parties can be withheld on the basis of work product protection. *E.g.*, *SEC v. Brady*, 238 F.R.D. 429,

[1] In the alternative, Defendants request the opportunity for full briefing on this issue.

444 (N.D. Tex. 2006) ("Waiver of work product protection only results if the work product is disclosed to an adversary or treated in a manner that substantially increases the likelihood that an adversary will come into possession of that material."). While KPMG and J.P. Morgan worked with Anadarko at arm's length, they were not potential adversaries with respect to the Withheld Documents, and thus work product protection was not waived. *E.g.*, *United States v. Deloitte LLP*, 610 F.3d 129, 139–43 (D.C. Cir. 2010).

Second, Lead Plaintiffs' invocation of the sword-shield doctrine is misplaced. Defendants do not rely upon the fact or outcome of the investigation as a defense (*see* Answer, ECF No. 72, at 35–39) and have not put the investigation "at issue" in this action so as to implicate the sword-shield doctrine. *See Doe v. Baylor Univ.*, 320 F.R.D. 430, 442 (W.D. Tex. 2017) (noting "[d]isclosure typically only waives work-product protection with respect to any document actually disclosed" and "subject-matter waiver is generally limited to instances where the quality and substance of an attorney's work product have been directly placed at issue in the litigation by the party asserting the privilege."); *Mir v. L-3 Communications Integrated Sys.*, 315 F.R.D. 460, 471–72 (N.D. Tex. 2016) (no waiver where defendant did not put privileged document "at issue" by relying on it as a defense).

Rather, it is Lead Plaintiffs who have attempted to put the investigation "at issue" in the action, starting with the numerous references to Ms. Frye's whistleblower allegations in the Amended Complaint (ECF No. 55) and continuing through their extensive discovery requests concerning the AAC's investigation, including from Defendants, Anadarko's former independent directors, NRF, KPMG and J.P. Morgan. Lead Plaintiffs have received voluminous non-privileged materials in response to these requests, but none of those productions constitute a waiver of protection over Withheld Materials or use by Defendants of such materials as a "sword". Rather than "selectively disclosing" investigation-related materials, Defendants have done exactly what the law requires by producing all materials disclosed to the SEC in response to Lead Plaintiffs' discovery requests.

Defendants' use of the Termination Letter in depositions also has not put the Withheld Materials "at issue" so as to implicate the sword-shield doctrine. The Termination Letter—authored by the SEC—is plainly not work product or an attorney-client communication. This alone renders inapplicable Plaintiffs' invocation of the sword-shield doctrine, and there is no basis to conclude that merely asking questions at a deposition about a non-privileged document could place the entire investigation "at issue" in this case. Lead Plaintiffs have not identified any documents that Defendants have used in this litigation that have been withheld—nor could they, as Defendants have produced all materials that were provided to the SEC—and offer no other examples of the purported "strategic use" of the AAC investigation in this action aside from the aforementioned use of the Termination Letter at depositions.

Respectfully,

/s/ Daniel Slifkin

Daniel Slifkin

CC: All Counsel of Record (*via ECF*)